Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-499

WARDEN, State Prison of Southern Michigan at Jackson,

Petitioner,

v

HARRISON BERRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WARDEN, State Prison of Southern Michigan at Jackson,

Petitioner,

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HARRISON BERRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Warden of the State Prison of Southern Michigan at Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 8, 1978.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App A of Petition) remanding Berrier's conviction of first degree murder with instructions to enter a conviction of second degree murder and resentence is reported at *People* v *Berrier*, 48 Mich App 454 (1973) *lv to appeal den without opinion* 390 Mich 813 (1973). The issues raised in this habeas corpus proceeding were pre-

sented by way of an application for delayed leave which was denied by the Michigan Court of Appeals in a summary order without opinion, *People* v *Berrier,* (Mich App No. 23198, May 25, 1975) *lv to appeal den without opinion* 395 Mich 764 (1975). The opinion of the United States District Court for the Eastern District of Michigan (App B of Petition) granting the writ of habeas corpus is reported at *Berrier* v *Egeler,* 428 F Supp 750 (ED Mich, 1976). The opinion of the United States Court of Appeals for the Sixth Circuit (App C of Petition) affirming the judgment of the district court is not yet reported. *Berrier* v *Egeler, Warden,* ..... F2d ..... (CA 6, No. 77-1100, August 8, 1978).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 8, 1978, and this petition for certiorari was filed within 90 days of that date. Pursuant to a timely motion filed in the Court of Appeals, an order staying the mandate of the Court of Appeals pending application to this Court for writ of certiorari was entered on August 31, 1978, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. Did the state court's jury instructions on the issue of self-defense, when viewed within the context of the overall charge and the trial as a whole, impermissibly shift the burden of proof onto Respondent thereby so infecting the entire trial that the resulting conviction violates due process?

2. Does the failure to make a timely challenge to jury instructions in a state court, in violation of a contemporaneous

objection rule, preclude such a challenge in a federal habeas corpus proceeding absent a showing of cause and actual prejudice?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MCLA 750.316; MSA 28.548:

> "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life."

MCLA 750.317; MSA 28.549:

> "All other kinds of murder shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years in the discretion of the court trying the same."

MCLA 769.26; MSA 28.1096:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of his resulted in a miscarriage of justice."

Michigan General Court Rules 1963, 516.2:

> "Objections. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the ground of his objections. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT OF THE CASE

This is a habeas corpus case in which the jurisdiction of the district court was invoked under 28 USC § 2254. Respondent Berrier alleged numerous infirmities in the state court trial which resulted in his conviction of murder but the district court considered only one issue and granted relief after concluding that the jury instructions on self-defense unconstitutionally shifted the burden of proof onto Berrier. The court of appeals, whose jurisdiction was based upon 28 USC § 1291, affirmed in a divided opinion.

On the night of March 30, 1970, Respondent Harrison Berrier, at his home with his wife and children, shot his unarmed brother-in-law seven times with a .22 caliber rifle and killed

him. Animosity had existed between them, arising from the fact that the decedent had testified against Berrier in a prior criminal trial. Berrier admitted the killing but alleged self-defense. The trial court commenced its jury instructions[1] by quoting the statutes pertaining to murder and by stating the theories of the prosecution and defense. Trial Transcript, p 549-551. After an explanation of the elements of the charge of first degree murder and its lesser included offenses, TT 551-557, the court began its discussion of the issue of self-defense with the following instruction, TT 557-558:

> "Self-defense in proper cases is a right of every person but it will not justify the taking of human life unless you jurors shall be satisfied from the testimony first that the Defendant was not the aggressor in bringing on the difficulty as has just been pointed out, second, that there existed at the time he shot the deceased, in the Defendant's mind, a present and impending necessity to shoot the Defendant [sic] in order to save himself from death or great bodily harm. Unless you find both of these elements in the case then a plea of self defense fails. The burden of proof of all such matters is upon the People to show the Defendant guilty of the offense here charged and the evidence must be such as to satisfy you that the killing was not done in self defense. The burden is not on the Defendant to make the plea of self defense to satisfy the jurors of the truth of his claim."

The court then elaborated upon the issue of self-defense by instructing the jury that there is no duty to retreat if one is assaulted in his own home and further instructed the jury that

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[1] By letter dated September 22, 1978, counsel for Petitioner requested the clerk of the court of appeals to certify and transmit to the clerk of this court a copy of the Appendix filed below which contains, *inter alia*, a transcript of the complete jury instructions TT 549-573.

there need not have been actual or real danger but that Berrier must merely have had reasonable cause to believe that danger was impending. The court then gave the following instruction, TT 559-560:

> "You are to determine from all of the evidence whether facts constituting such reasonable cause have been established and unless such facts constituting such reasonable cause have been established by the defense in this case you cannot acquit on the ground of self-defense, but his actions and conduct are to be judged from the circumstances as they appeared to him at that time and if from all the evidence in the case there exists in your mind a reasonable doubt whether the respondent did not in fact kill . . . then it would be your duty to render a verdict of not guilty."

The court repeated its instruction on the issue of self-defense, although incorrectly stating that the defendant had a duty to retreat and then gave the following instruction, TT 561-562:

> "Unless you find that all three of these facts are established in this case then the plea of self-defense fails. The burden of proof of all such matters is upon the People to show that the respondent is guilty of the offense charged and the People's testimony must be such as to satisfy the jurors that the killing was not done in self-defense. The burden is not on the Defendant who makes the claim of self-defense to satisfy the jury of the truth of his claim.
>
> "• • •
>
> "You will recall that at the commencement of this trial the Court instructed the jury as to the presumption of innocence of the Defendant. It is a rule of law in criminal cases that the Defendant starts in the trial of a case with a presumption of innocence and this presumption con-

> tinues through the course of the trial until and unless after reaching the jury room you arrive at the conclusion that the People have proven the Defendant is guilty beyond a reasonable doubt. In criminal cases the burden rests upon the People to establish the Defendant's guilt of the offense charged belond a reasonable doubt. This applies to every essential element of the alleged offense. The Defendant is not required to prove his innocence and the fact that a person is charged with a crime creates no presumption whatsoever as to his guilt or innocence. The Prosecution is not however, required to prove the Defendant's guilt beyond any doubt whatever, but only beyond a reasonable doubt, but if there is a reasonable doubt then the defendant must be found not guilty."

After defining the term "reasonable doubt" the court instructed the jury as follows, TT 562:

> "To find the Defendant guilty you must be able to say that there is no rational theory on which credible evidence can be reconciled but that of the Defendant's guilt."

The instructions closed with an explanation of the jury's duty to evaluate the credibility of witnesses and with an explanation of the possible verdicts. At the close of the instructions defense counsel responded to a question from the court and specifically stated that there was no objection on behalf of the defendant. TT 568.

Approximately one-half hour after the deliberations began the jury requested further instructions on the issue of self-defense. The court then repeated its instruction to the jury that self-defense will not justify the taking of human life unless the jurors are satisfied from the testimony that the Defendant was without fault, that there existed in the Defendant's mind at the time he fired the weapon a present and impending necessity to shoot the decedent in order to save himself or a

member of his family from death or from great bodily harm, and that as it then appeared to the Defendant there must have been no way open whereby he could have retreated to a place of safety and avoided the conflict. TT 569-570. At the request of defense counsel the jury was again recalled and the court cautioned them that they were not to give any greater weight to one portion of the instructions than another. Defense counsel then stated his satisfaction with the instructions. TT 571.

After a few hours of deliberation Respondent was convicted by the jury of first degree murder and was subsequently sentenced to the mandatory term of life imprisonment. The Michigan Court of Appeals remanded the case for entry of a judgment convicting Berrier of second degree murder. *People* v *Berrier*, 48 Mich App 454 (1973) *lv to appeal den without opinion*, 390 Mich 813 (1973). Following resentencing, Respondent is currently serving a term of 20 to 40 years imprisonment.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AS TO THE BURDEN, IN A COLLATERAL CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF A STATE COURT'S JUDGMENT, OF DEMONSTRATING ERROR BASED UPON ALLEGEDLY ERRONEOUS JURY INSTRUCTIONS.

Although no Michigan case has held that under Michigan law the absence of self-defense is an "element" of the crime of murder, it is conceded that where, as here, a defendant has raised the issue, the burden of negating self-defense is on the

prosecution. *People* v *Stallworth*, 364 Mich 528; 111 NW2d 742 (1961). Petitioner asserts that the instructions given in the instant case did not in fact shift onto Respondent the burden of establishing his self-defense theory.

In this habeas corpus action, the applicant for the writ bears a heavy burden of establishing the existence of error so extreme as to render his conviction unconstitutional. The question is whether a particular instruction which is alleged to shift the burden of proof "by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v *Naughten*, 414 US 141, 147 (1973). The question is not whether portions of the instructions are undesirable or erroneous, nor is it whether the trial court failed to isolate and cure a particular ailing instruction; Respondent must demonstrate that an instruction violated his constitutional right to a fundamentally fair trial. *Cupp* v *Naughten, supra*, 414 US at 146-147; *Henderson* v *Kibbe*, 431 US 145, 154 (1977). Although conflicting instructions on the duty to retreat were given, that merely raises a question of state law which was presented to the Michigan appellate courts in an application for delayed leave to appeal and was conclusively resolved for the purposes of this habeas corpus action when the Michigan courts declined review.

At only one point in the instructions did the court state that any burden was on the defense, and even that sentence twice noted that the jury's determination was to be made on facts "from all the evidence." TT 559. However, that lone statement, even if incorrect, cannot by itself justify a conclusion that the instructions as a whole are constitutionally deficient since "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v *Naughten, supra*, 414 US at 146-147. Any misstatement or vagueness in the instructions on burden of proof was obviously inadvertent and pales to constitutional

insignificance when viewed in the context of the overall charge in which any such infirmities were more than counterbalanced by repeated correct instructions that the burden was always on the prosecution to prove the elements of the offense and that the burden was never on the defense to satisfy the jury of the truth of Respondent's claim of self-defense. TT 557-558, 561-562.

Cupp v *Naughten, supra,* 414 US at 147 also states that "the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." Here, in addition to the numerous correct instructions, another trial component leading to Respondent's conviction was the evidence negating the self-defense theory. The evidence adduced at trial demonstrated the Defendant's acquaintance with his brother-in-law the decedent, and demonstrated the existence of animosity between them. Furthermore, the circumstances of the crime itself negate self-defense since the decedent, who was unarmed, was shot seven times with a rifle. A murder conviction on such evidence simply indicates that the jury believed the prosecution's theory that the killing was not done in self-defense.

Under these circumstances, when the allegedly erroneous instruction is viewed within the context of the instructions as a whole and within the entirety of the trial, the record simply does not support the court of appeals' conclusion that the instructions impermissibly shifted the burden of proof to such an extent that the entire trial was so infected as to render the conviction unconstitutional. In reaching its conclusion that habeas corpus relief should be granted the court of appeals misapplied the standards enunciated in *Cupp* v *Naughten, supra,* 414 US 141 and *Henderson* v *Kibbe, supra,* 431 US 145. This court should grant review in order to ensure compliance with the requirement that a successful collateral attack on the constitutional validity of a state court's judgment must over-

come a heavier burden than the showing required to establish plain error on direct appeal within the federal court system. *Henderson* v *Kibbe, supra,* 431 US at 154.

II

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT HABEAS CORPUS RELIEF IS NOT AVAILABLE TO OVERTURN A STATE-COURT CONVICTION WHERE THE DEFENSE FAILED TO COMPLY WITH A CONTEMPORANEOUS OBJECTION RULE AND HAS MADE NO SHOWING OF CAUSE AND ACTUAL PREJUDICE.

In *Francis* v *Henderson,* 425 US 536 (1976) this court applied the rule announced in *Davis* v *United States,* 411 US 233 (1973) and held that for reasons of comity and concern for the orderly administration of criminal justice, federal habeas corpus relief is not available to overturn a state court conviction resulting from an allegedly unconstitutional grand jury indictment where the defendant failed to make a timely challenge in the state court and has made no showing of cause for the failure to object and actual prejudice. The *Francis* rule was applied in *Wainwright* v *Sykes,* 433 US 72 (1977) to a waived objection to the admission of a confession at a state court trial. Although neither *Francis* v *Henderson, supra,* nor *Wainwright* v *Sykes, supra,* involves allegedly improper jury instructions as in the instant case, *Hankerson* v *North Carolina,* 432 US 233 (1977) indicates that habeas corpus relief is also barred in this context.

In *Hankerson* this Court gave retroactive effect to the rule of *Mullaney* v *Wilbur,* 421 US 684 (1975) requiring the states to persuade the jury beyond a reasonable doubt as to all elements of the crime charged. Like the instant case, *Hankerson*

involved a challenge to jury instructions on the issue of self-defense which were alleged to improperly shift the burden of proof onto the defendant. No objection to the instructions was made at Hankerson's trial but, unlike the instant case, the North Carolina Supreme Court passed on the validity of the instructions and held that they did in fact place the burden on the defendant. In rejecting the state's claim that giving *Mullaney* retroactive effect would have a "devastating" impact on the administration of justice, this court said:

> "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson* v *North Carolina, supra,* 432 US at 244, fn 8.

The considerations of comity and concern for the orderly administration of criminal justice which form the basis for the decision in *Francis* v *Henderson, supra,* and *Wainwright* v *Sykes, supra,* are also present in the instant case which involves a challenge to allegedly improper jury instructions. The potential harm to a defendant from failure to object to the introduction of a confession, as in *Wainwright* v *Sykes, supra,* is much more serious than the potential harm from failure to object to a confusing or erroneous jury instruction. Furthermore, the state interests which are furthered by the contemporaneous objection rule in the context of challenges to allegedly improper jury instructions are certainly identical to those interests when such a rule is applied in the context of challenges to a grand jury indictment or the admission of a confession. See *Wainwright* v *Sykes, supra,* 433 US at 88-91.

In the instant case all of the requirements of the *Francis* rule exist, and therefore habeas corpus relief should not be available. It cannot be disputed that Michigan has a contemporaneous objection rule applicable to challenges to jury instructions, both by statute, MCLA 769.26; MSA 28.1096 and by court rule, GCR 1963, 516.2. Furthermore it cannot be disputed that no timely objection to the jury instructions was made on behalf of the defense, and in fact defense counsel twice expressed his satisfaction with the instructions. TT 568, 571.

The *Francis* rule barring habeas corpus relief makes an exception where a defendant has demonstrated the existence of cause for failure to make a timely objection and a demonstration of actual prejudice. Respondent Berreir has advanced no explanation whatever for his failure to object at trial to the jury instruction which he now claims deprived him of a fair trial. Moreover, there has been no showing of any actual prejudice due to the failure to object. Substantial question exists whether the instruction did in fact impermissibly shift the burden of proof (see Reasons for Granting the Writ, I, *supra,* pp 8-11) and even if an objection had been made, there is no certainty that it would have been sustained. Furthermore, evidence of guilt presented at trial (including the fact that respondent knew the decedent well, that animosity existed between them and that the unarmed decedent was shot seven times with a rifle) "was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent . . . ." *Wainwright* v *Sykes, supra,* 433 US at 91.

This case is important not only to the instant parties but also to many other litigants since it presents the question whether the *Francis* rule will be applied to cases in which the state court defendant failed to make a timely challenge to jury instructions as well as to cases in which defendants failed to make timely challenges to grand jury indictments and the admission of confessions. The court of appeals' conclusion that the failure to make a timely objection does not bar subsequent habeas corpus review conflicts with the principles expressed in *Francis* v *Henderson, supra,* 425 US 536, and *Wainwright* v

Sykes, 433 US 72 and this court should grant review to correct the court of appeals' error.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: September 22, 1978.

APPENDIX

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(48 Mich App 456)

Appeal from Washtenaw, Ross W. Campbell, J. Submitted Division 2 May 8, 1973, at Lansing. (Docket No. 14221.) Decided July 24, 1973. Leave to appeal denied, 390 Mich .....

Harrison Berrier was convicted of first-degree murder. Defendant appeals. Remanded with instructions to enter a conviction of second-degree murder and resentence.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *John J. Hensel,* First Assistant Prosecuting Attorney, for the people.

Francis D. Ross and *Edmund J. Sikorski, Jr.,* for defendant.

Before: QUINN. P.J., and BRONSON and O'HARA,* JJ.

QUINN, P.J. A jury convicted defendant of first-degree murder, MCLA 750.316; MSA 28.548. He was sentenced and he appeals.

The decedent was defendant's brother-in-law. Animosity existed between them, arising from the fact that decedent had testified against defendant in a prior criminal trial. Defendant testified that about 9:30 on the night of March 30, 1970, decedent came to defendant's home and said to defendant that decedent had heard that defendant was "looking" to kill him. To this defendant replied, "No Joe, you're not worth it". Defendant then related that shortly thereafter he and decedent went for a ride, settled their differences, and shook hands.

Defendant returned home and watched TV. He

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

(48 Mich App 457)

was drowsing about 11:15, when he heard a ruckus at the outside door, and defendant testified that he heard his wife scream, "Look out he's got a gun or look out, he's going to kill you". Defendant said that he grabbed a loaded .22 rifle standing against the wall next to him, stepped through the kitchen door, saw the figure of an unknown man, who appeared to be violent, entering the kitchen. That defendant shot the man and later called the police. Decedent was shot seven times.

It is defendant's claim in his first two issues on appeal that the evidence does not support a verdict of guilty of first-degree murder and that such a verdict is contrary to law. We consider that this is one issue and discuss it at the end of this opinion.

During defendant's direct testimony, he attempted to relate the statement allegedly made by his wife, "He is going to kill you". The prosecutor objected on the basis of hearsay and was sustained. On appeal, defendant asserts this was reversible error because the statement was admissible as a res gestae statement. We agree with defendant that the statement was admissible as a res gestae statement and that it was error to exclude it . We do not agree that the error was reversible error for the reason that the same statement was twice related to the jury, once in a taped statement by defendant and once during his cross-examination.

The only persons present at the shooting were defendant, his wife, and decedent. Defendant claimed he shot in self-defense but he did not call his wife as a witness. After the defense rested and in the absence of the jury, the prosecution informed the trial judge that it had a taped statement from Mrs. Berrier in which she denied making the statement de-

fendant said she made at the time of the shooting. The prosecutor moved the (48 Mich App 458)

Court for permission to call Mrs. Berrier for limited rebuttal or in the alternative to play the tape.

The court found that the statement, "Look out, he's got a gun", attributed to his wife by defendant, was introduced in evidence at the insistence of the defendant. The court further found that defendant volunteered the same statement during cross-examination in violation of admonitions from the prosecuting attorney, defense counsel, and the court not to do so. The record supports these findings. The court then found that defendant had waived any privilege with respect to the particular statement allegedly made by the wife. In the absence of the jury to insure that Mrs. Berrier testified within the limitation expressed by the court, the prosecutor was required to make an offer of proof. Thereafter, in the presence of the jury and over defendant's objection, Mrs. Berrier testified that she made no statement before the shooting.

Defendant asserts that this was in violation of MCLA 600.2162; MSA 27A.2162. The limited waiver found by the trial court is supported by this record, and we find no error on this issue.

At trial, a Wayne County detective was permitted, over objection, to testify that decedent had testified against defendant at the latter's trial in Wayne County on a charge of larceny. Relying on *People v Askar*, 8 Mich App 95; 153 NW2d 888 (1967) and *People v Shaw*, 9 Mich App 558; 157 NW2d 811 (1968), defendant claims it was error for the trial court not to give immediately a *sua sponte* limiting instruction as to this testimony.

The testimony was offered and admitted as a basis for find-

ing motive. While we doubt the application of the *Askar* doctrine in this situation, we follow *People v Albert White*, 27 Mich App 432; 183 NW2d 606 (1970).

(48 Mich App 459)

Defendant claims reversible error because the prosecutor failed to produce all endorsed witnesses. Defendant fails to identify the witnesses allegedly not called, nor does he indicate any prejudice from their failure to testify. No objection was made at trial to the failure to produce. No error is shown.

At the original trial, defendant's motion for a mistrial was granted January 4, 1971. The jury was not brought back in the courtroom and formally discharged, but after granting the mistrial, the trial judge went to the jury room and advised the jury that they were discharged. That same afternoon a new jury was selected without objection and both sides indicated their satisfaction with the jury selected.

On appeal, defendant claims error because the first jury was not discharged in the presence of the accused and the reason for the discharge was not stated on the record. He further asserts that he neither waived nor consented to the discharge. If defendant has an issue on this point, it was not preserved for review.

With respect to defendant's contention that the evidence does not support a verdict of guilty of first-degree murder, we agree. Our review of the record does not disclose evidence which supports a reasonable inference of premeditation. However, the background of animosity and the reason therefor, the circumstances surrounding the shooting, and the fact that defendant shot decedent seven times adequately supports a finding of intentional killing, from which malice aforethought

may be inferred, *People v Morrin*, 31 Mich App 301, 310; 187 NW2d 434, 438 (1971). On the basis of *Morrin*, defendant is guilty of second-degree murder.

Remanded to the trial court for entry of judg-

(48 Mich App 460)

ment convicting defendant of second-degree murder and for resentencing on that conviction.

O'HARA, J., concurred.

BRONSON, J. (*concurring*). Considering the entire record in this appeal, I concur in the result. Upon the issue of limiting instructions after admission of evidence pursuant to MCLA 768.27; MSA 28.1050, I am somewhat troubled by the language found in *People v Albert White*, 27 Mich App 432; 183 NW2d 606 (1970). I prefer to rest my conclusion upon section II of *People v Kelly*, 386 Mich 330, 335-337; 192 NW2d 494, 497-498 (1971), and the further analogous reasoning in *People v Guilinger*, 30 Mich App 711, 715; 186 NW2d 861, 863 (1971). I am persuaded that any alleged error on this issue was harmless. The defendant failed to object to admission of the same evidence when brought out during cross-examination of the defendant. Examination of the entire cause fails to demonstrate that the errors complained of resulted in a miscarriage of justice. MCLA 769.26; MSA 28.1096.

Harrison BERRIER, Petitioner,

v.

Charles E. EGELER, Warden, State Prison of Southern Michigan, at Jackson, Michigan, Respondent.

Civ. A. No. 6-70546.

United States District Court,
E. D. Michigan, S. D.

Nov. 22, 1976.

(428 F. Supp. 751)

Arthur J. Tarnow, Detroit, Mich., for petitioner.

Frank J. Kelley, Atty. Gen. of the State of Mich., by Christine A. Derdarian, Crim. Div., Lansing, Mich., for respondent.

MEMORANDUM OPINION

FEIKENS, District Judge.

Harrison Berrier, an inmate at the State Prison of Southern Michigan at Jackson, Michigan, was convicted of first degree murder on January 19, 1971 in the Washtenew County Circuit Court and later sentenced to a term of life imprisonment. On appeal the Michigan Court of Appeals held that the evidence did not support a conviction of first degree murder. *People v. Berrier*, 48 Mich. App. 454, 210 N.W.2d 506, *aff'd*, 390 Mich. 813, 212 N.W.2d 598 (1973). A conviction of second degree murder was subsequently entered and Berrier was resentenced to a term of twenty to forty years' imprisonment. Berrier then petitioned this court for a writ of habeas corpus, but this petition was dismissed in May, 1973. *Berrier v. Michigan Department of Corrections*, No. 38647 (E.D. Mich. 1973).

Berrier now brings a second petition for a writ of habeas corpus, raising three new issues. He claims that his appellate counsel ineffectively assisted him because counsel failed to raise substantial issues on appeal;

(428 F. Supp. 752)

that the trial judge impermissibly shifted the burden of proof on the issue of self-defense, and that the trial judge failed to instruct the jury that it could return a general verdict of not guilty. Respondent moves to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Federal Rules of Civil Procedure.[1]

In reviewing the trial judge's instructions of self-defense the court begins with the general rule that error in jury instructions is not a basis for habeas corpus relief. *Linebarger v. Oklahoma*, 404 F.2d 1092, 1095 (10th Cir. 1968), *cert. denied*, 394 U.S. 938, 89 S.Ct. 1218, 22 L.Ed.2d 470 (1969); *Bustamante v. Cardwell*, 497 F.2d 556 (9th Cir. 1974); *Higgins v. Wainwright*, 424 F.2d 177, 178 (5th Cir. 1970), *cert. denied*, 400 U.S. 905, 91 S.Ct. 145, 27 L.Ed.2d 142 (1970), *reh. denied*, 400 U.S. 1002, 91 S.Ct. 463, 27 L.Ed.2d 455 (1971); *Young v. Alabama*, 443 F.2d 854 (5th Cir. 1971), *cert. denied*, 405 U.S. 976, 92 S.Ct. 1202, 31 L.Ed.2d 251 (1972). Habeas corpus will be available only if the error is so serious that it denies due process to the defendant and renders the trial fundamentally unfair in a constitutional sense. *Higgins v. Wainwright*, supra; *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *DeBerry v. Wolff*, 513 F.2d 1336 (8th Cir. 1975).

[1] Respondent acknowledges that Berrier has exhausted his available state remedies; a prerequisite to seeking habeas corpus relief. 28 U.S.C. § 2241.

Berrier made no objection to the trial judge's instructions at the time of trial. Normally, therefore, he would be deemed to have waived these objections. *See Ridgeway v. Hutto*, 474 F.2d 22 (8th Cir. 1973); *Naughten v. Cupp*, 476 F.2d 845 (9th Cir. 1973), *rev'd on other grounds*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed2d 368 (1973). However, even in the absence of trial objection, habeas corpus relief is still available in a case of plain constitutional error. *See United States v. Buffa*, 527 F.2d 1164 (6th Cir. 1975), where the United States Court of Appeals for the Sixth Circuit stated that an erroneous instruction may be the basis for reversal of a conviction even when no objection was made at trial, if it constituted plain error. *See also, Singer v. United States*, 380 U.S. 24, 38, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *United States v. Griffin*, 382 F.2d 823, 828 (6th Cir. 1967). *Minor v. Black*, 527 F.2d 1, 4-5 (6th Cir. 1975), where the United States Court of Appeals for the Sixth Circuit held that the failure of petitioner, or his counsel, to object at trial to the admission of certain evidence cannot preclude federal habeas corpus relief in the absence of even a suggestion that such failure was a deliberate bypass of state court procedure. *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

Berrier's allegation is that the trial judge's instructions to the jury placed upon him the burden of proving his claim of self-defense. This, if shown, amounts to plain constitutional error and warrants the grant of a petition for a writ of habeas corpus.[2] It is well settled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

[2]

See generally, Note: Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on A Criminal Defendant, 64 *Georgetown Law Journal* 871 (1976).

The United States Supreme Court recently considered in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) a jury instruction which placed upon the defendant the burden of showing by a fair preponderance of the evidence, that he had acted in the heat of passion and, thus, without malice aforethought when he fatally assaulted the deceased. The court held, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the *absence* of the heat of passion or sudden provocation when the issue is properly presented in a homicide case." *Mullaney* at

(428 F. Supp. 753) 705, 95

S.Ct. at 1892 (emphasis added).[3] Similarly, a defendant should not have to prove the elements of self-defense. Rather, under the *Winship* standard, the government should be required to prove beyond a reasonable doubt the absence of the elements of self-defense.[4]

In Berrier's case the trial judge instructed the jury as to the elements of self-defense—that the defendant may not be the aggressor, that the defendant must reasonably believe

[3]

For additional authority that the burden of proof should never shift to the defense in a criminal case, see, *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), *cert. denied*, 409 U.S. 885, 93 S.Ct. 99, 34 L.Ed.2d 141 (1972) [alibi defense]; *Trimble v. Stynchcombe*, 481 F.2d 1175 (5th Cir. 1973) [alibi defense]; *Cool v. United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) [exculpatory accomplice testimony]; *Dixon v. Hopper*, 407 F.Supp. 58 (M.D.Ga. 1976) [alibi defense]; *Stump v. Bennett*, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 US. 1001, 89 S. Ct. 483, 21 L.Ed.2d 466 (1968) [alibi defense]; *United States v. Ambrose*, 483 F.2d 742 (6th Cir. 1973) [entrapment]; *United States v. Sennett*, 505 F.2d 774 (7th Cir. 1974) [insanity defense]. *Contra, Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) [no constitutional right to an instruction that government must prove sanity].

[4]

The court notes that this is also the rule in Michigan. *People v. Stallworth*, 364 Mich. 528, 111 N.W.2d 742 (1961).

that he or another under his protection is in danger of death or great bodily harm, and that there must be no way open for the defendant to retreat safely. (Transcript at 557). He then gave the correct instruction that a person in his own home need not retreat if assaulted. (Transcript at 558). The judge then went on to say:

> "You are to determine from all of the evidence whether facts constituting such reasonable cause have been established and unless such facts constituting such reasonable cause have been established by the defense in this case you cannot acquit on the ground of self defense. . . ."

(Transcript at 559).

This statement implies that the defendant must prove his claim of self-defense. A short time later the trial judge made this confusing statement:

> Self-defense in proper cases is the right of every person but it will not justify the taking of a human life unless the jurors shall be satisfied from the testimony first that the Defendant was not the aggressor in bringing on the difficulty, that is, that he was without fault; second, that there existed at the time of the striking of the fatal blow in his mind a present and impending necessity to strike such a blow in order to save himself from death or some great bodily harm; third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus have avoided the conflict. Unless you find that all three of these facts are established in this case then the plea of self-defense fails. The burden of proof of all such matters is upon the People to show that the respondent is guilty of the offense charged and the People's testimony must be such as to satisfy the jurors that the killing was not done in self defense. The burden is not on the Defendant who makes the claim of self defense to satisfy the jury of the truth of his claim.

(Transcript at 560-561).

Here the trial judge did not instruct the jury that a person in his own home has no duty of retreat, a crucial instruction in this case since the testimony showed that the defendant was in his own home when he killed his brother-in-law. This is error under Michigan law. *People v. Lenkevich,* 394 Mich. 117, 229 N.W.2d 298 (1975). The judge then went on to imply again that the defendant must establish the elements of self-defense. This mistake is only partially rectified by his final statement relieving the defendant from the burden of satisfying the jury of his claim.

Jury instructions are to be judged as a whole. *Cupp v. Naughten,* 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *United States v. Mattucci,* 502 F.2d 883, 888-9 (6th Cir. 1974). However, instructions must not

be such as to mislead the jury; they should be consistent and harmonious. *Smith v. United States,* 230 F.2d 935, 939 (6th Cir. 1956) ["The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it."]. *See also United States v. Reid,* 517 F.2d 953, 965 (2d Cir. 1975); and cases cited therein.

In this case it is clear that the jury was confused when it began deliberations. After it had deliberated for a short time it asked the court to repeat the "three elements necessary to be present for a self defense decision." (Transcript at 569). The phrasing of the question indicates that the jury was approaching deliberations with the mistaken assumption that it must decide that the elements of self-defense had been established before returning a not guilty verdict. The trial judge's answer further misinformed the jury:

> Self defense is, in a proper case, a good defense and the right of every person, but it will not justify the taking of human life unless the jurors are satisfied from the testimony of all three of the following things. First, that the Defendant was without fault, second, that there existed in the Defendant's mind at the time he fired the weapon a present and impending necessity to shoot the decedent in order to save himself or a member of his family from death or some great bodily harm; and, third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus have avoided the conflict.

Although the trial judge admonished the jury that this answer was to be taken in conjunction with all of the instructions (Transcript at 571), it is clear that the answer emphasized the erroneous instructions given earlier, repeating the wrong instruction on duty of retreat and again placing upon the defendant the burden of establishing his claim of self-defense. This removes any possibility that the error could be considered harmless beyond a reasonable doubt. *See Mullaney*, 421 U.S. at 705, 95 S.Ct. 1881 (Rehnquist, J., concurring); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The court concludes that the trial judge's instructions on the issue of self-defense denied due process to the defendant and rendered his trial fundamentally unfair in a constitutional sense. Since this conclusion is dispositive of Berrier's petition, the court declines to consider any of his other allegations.

Accordingly, Berrier's petition for a writ of habeas corpus is granted. He should be released from custody unless he is retried within a reasonable time. An order is entered herewith.

(Slip Opinion, p.1)

No. 77-1100

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRISON BERRIER,
Petitioner-Appellee,
v.
CHARLES E. EGELER, WARDEN, STATE PRISON OF SOUTHERN MICHIGAN AT JACKSON,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed August 8, 1978.

Before: EDWARDS and ENGEL, Circuit Judges, and GRAY,* Senior District Judge.

EDWARDS, Circuit Judge, delivered the opinion of the court, in which GRAY, Senior District Judge, concurred. ENGEL, Circuit Judge (pp. 16-23), filed a separate dissenting opinion.

EDWARDS, Circuit Judge. This is a habeas corpus petition where a District Judge in the Eastern District of Michigan, Southern Division, granted petitioner the relief he sought. The facts show that petitioner killed his brother-in-law in his (the petitioner's) home. He contended that he shot in self-defense. The trial judge, in a confused instruction, told the

* Honorable Frank Gray, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

(Slip Opinion, p.2)

jury that the defendant had the burden of proof as to self-defense and that he had a duty to retreat, if possible, in his own home.

Appellant was convicted of first degree murder by the jury and sentenced to life imprisonment. The Michigan Court of Appeals vacated the sentence and, under the trial record, re-sentenced for second degree murder. Petitioner therefore is now serving a 20-40 year sentence.

His present petition contends that his due process rights were violated by the fact that at the trial the judge placed the burden of proof that the killing was in self-defense upon defendant and, in addition, instructed the jury that defendant at the time of the killing was under a duty to retreat in his own home to the degree he could do so safely. This instruction, he asserts, was in violation of Michigan law, *People* v. *Stallworth*, 364 Mich. 528, 111 N.W.2d 742 (1961), and federal constitutional law, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

The facts as revealed in the state court trial of this case were recited as follows in the opinion of the Michigan Court of Appeals:

> The decedent was defendant's brother-in-law. Animosity existed between them, arising from the fact that decedent had testified against defendant in a prior criminal trial. Defendant testified that about 9:30 on the night of March 30, 1970, decedent came to defendant's home and said to defendant that decedent had heard that defendant was "looking" to kill him. To this defendant replied, "No Joe, you're not worth it." Defendant then related that shortly thereafter he and decedent went for a ride, settled their differences, and shook hands.

> Defendant returned home and watched TV. He was drowsing about 11:15, when he heard a ruckus at the outside door, and defendant testified that he heard his wife scream, "Look out he's got a gun or look out, he's going to kill you." Defendant said that he grabbed a loaded .22 rifle standing against the wall next to him,

(Slip Opinion, p.3)

> stepped through the kitchen door, saw the figure of an unknown man, who appeared to be violent, entering the kitchen. That defendant shot the man and later called the police. Decedent was shot seven times.
>
> • • •
>
> During defendant's direct testimony, he attempted to relate the statement allegedly made by his wife, "He is going to kill you." The prosecutor objected on the basis of hearsay and was sustained. On appeal, defendant asserts this was reversible error because the statement was admissible as a res gestae statement. We agree with defendant that the statement was admissible as a res gestae statement and that it was error to exclude it. We do not agree that the error was reversible error for the reason that the same statement was twice related to the jury, once in a taped statement by defendant and once during his cross-examination.
>
> The only persons present at the shooting were defendant, his wife, and decedent.

People v. *Berrier*, 48 Mich. App. 454, 456-58, 210 N.W.2d 506, *leave to appeal denied*, 390 Mich. 818, 212 N.W.2d 598 (1973).

There has been exhaustion of state court remedies on the issues with which we are presently concerned. But it is clear that the original appeals in the Michigan court system did not center upon the judge's instructions which concern us now, perhaps because no objection was made to them by appellant's counsel at trial.

The grounds for the grant of the writ of habeas corpus are effectively set forth in the opinion of District Judge John Feikens, dated November 19, 1976:

> Berrier's allegation is that the trial judge's instructions to the jury placed upon him the burden of proving his claim of self-defense. This, if shown, amounts to plain constitutional error and warrants the grant of a petition
>
> (Slip Opinion, p.4)
>
> for a writ of habeas corpus.[2] It is well settled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The United States Supreme Court has recently considered (*Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) a jury instruction which placed upon the defendant the burden of showing by a fair preponderance of the evidence, that he had acted in the heat of passion and, thus, without malice aforethought when he fatally assaulted the deceased. The court held, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the *absence* of the heat of passion or sudden

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See generally, Note: Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on A Criminal Defendant, 64 *Georgetown Law Journal* 871 (1976).

> provocation when the issue is properly presented in a homicide case." *Mullaney* at 705 (emphasis added).[3] Similarly, a defendant should not have to prove the elements of self-defense. Rather, under the *Winship* standard, the government should be required to prove beyond a reasonable doubt the absence of the elements of self-defense.[4]
>
> In Berrier's case the trial judge instructed the jury as to the elements of self-defense — that the defendant may not be the aggressor, that the defendant must reasonably
>
> (Slip Opinion p.5)
>
> believe that he or another under his protection is in danger of death or great bodily harm, and that there must be no way open for the defendant to retreat safely. (Transcript at 557). He then gave the correct instruction that a person in his own home need not retreat if assaulted. (Transcript at 558). The judge then went on to say:

[3]

For additional authority that the burden of proof should never shift to the defense in a criminal case, *see e.g.*, *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), *cert. denied*, 409 U.S. 885 (1972) [alibi defense]; *Trimble v. Stynchcombe*, 481 F.2d 1175 (5th Cir. 1973) [alibi defense]; *Cool v. United States*, 409 U.S. 100 (1972) [exculpatory accomplice testimony]; *Dixon v. Hopper*, 407 F. Supp. 58 (M.D. Ga. 1976) [alibi defense]; *Stump v. Bennett*, 398 F.2d 11, *cert. denied*, 393 U.S. 1001 (1968) [alibi defense]; *United States v. Ambrose*, 483 F.2d 742 (6th Cir. 1973) [entrapment]; *United States v. Sennett*, 505 F.2d 774 (7th Cir. 1974) [insanity defense]. *Contra, Leland v. Oregon*, 343 U.S. 790 (1952) [no constitutional right to an instruction that government must prove sanity].

[4]

The court notes that this is also the rule in Michigan. *People v. Stallworth*, 364 Mich. 528 (1961).

"You are to determine from all of the evidence whether facts constituting such reasonable cause have been established and unless such facts constituting such reasonable cause have been established by the defense in this case you cannot acquit on the ground of self defense . . . ."

This statement implies that the defendant must prove his claim of self-defense. A short time later the trial judge made this confusing statement:

> Self-defense in proper cases is the right of every person but it will not justify the taking of a human life unless the jurors shall be satisfied from the testimony first that the Defendant was not the aggressor in bringing on the difficulty, that is, that he was without fault; second, that there existed at the time of the striking of the fatal blow in his mind a present and impending necessity to strike such a blow in order to save himself from death or some great bodily harm; third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus have avaoided the conflict. Unless you find that all three of these facts are established in this case then the plea of self-defense fails. The burden of proof of all such matters is upon the People to show that the respondent is guilty of the offense charged and the People's testimony must be such as to satisfy the jurors that the killing was not done in self-defense. The burden is not on the Defendant
>
> (Slip Opinion, p.6)
>
> who makes the claim of self defense to satisfy the jury of the truth of his claim.

Here the trial judge did not instruct the jury that a person in his own home has no duty of retreat, a crucial instruction in this case since the testimony showed that the defendant was in his own home when he killed his brother-in-law. This is error under Michigan law. *People* v. *Lenkevitch*, 394 Mich. 110 (1975). The judge then went on to imply again that the defendant must establish the elements of self-defense. This mistake is only partially rectified by his final statement relieving the defendant from the burden of satisfying the jury of his claim.

Jury instructions are to be judged as a whole. *Cupp* v. *Naughten*, 414 U.S. 141 (1973); *United States* v. *Mattucci*, 502 F.2d 883 (6th Cir. 1974). However, instructions must not be such as to mislead the jury; they should be consistent and harmonious. *Smith* v. *United States*, 230 F.2d 935, 939 (6th Cir. 1956) ["The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it."] *See also United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975).

In this case it is clear that the jury was confused when it began deliberations. After it had deliberated for a short time it asked the court to repeat the "three elements necessary to be present for a self-defense decision." (Transcript at 569). The phrasing of the question indicates that the jury was approaching deliberations with the mistaken assumption that it must decide that the elements of self defense had been established before returning a not guilty verdict. The trial judge's answer further misinformed the jury:

> Self defense is, in a proper case, a good defense and the right of every person, but it will not justify the taking of human life unless the jurors are satis-

fied from the testimony of all three of the following

(Slip Opinion, p.7)

> things. First, that the Defendant was without fault, second, that there existed in the Defendant's mind at the time he fired the weapon a present and impending necessity to shoot the decedent in order to save himself or a member of his family from death or some great bodily harm; and, third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus have avoided the conflict.

Although the trial judge admonished the jury that this answer was to be taken in conjunction with all of the instructions (Transcript at 571), it is clear that the answer emphasized the erroneous instructions given earlier, repeating the wrong instruction on duty of retreat and again placing upon the defendant the burden of establishing his claim of self-defense. This removes any possibility that the error could be considered harmless beyond a reasonable doubt. *See Mullaney,* at 705 (Rehnquist, J., concurring); *Chapman* v. *California,* 386 U.S. 18 (1967).

The court concludes that the trial judge's instructions on the issue of self-defense denied due process to the defendant and rendered his trial fundamentally unfair in a constitutional sense. Since this conclusion is dispositive of Berrier's petition, the court declines to consider any of his other allegations.

Berrier v. *Egeler,* 428 F. Supp. 750, 752-54 (E.D. Mich. 1976).

On review of the appellate record before us, we conclude that appellant's federal due process rights were violated by

failure to place the burden of proof upon the state as to appellant's self-defense theory. *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975); *In re Winship,* 397 U.S. 358 (1970). *See also People* v. *Stallworth,* 364 Mich. 528, 111 N.W.2d 742 (1961).

(Slip Opinion, p.8)

Nor do we find any conflict between the District Judge's opinion and more recent Supreme Court cases such as *Patterson* v. *New York,* 432 U.S. 197, 97 S.Ct. 2319 (1977), and *Wainwright* v. *Sykes,* 433 U.S. 72, 97 S.Ct. 2497 (1977). In *Patterson* the Court's opinion clearly recognizes that "a state must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson* v. *New York, supra* at 215, 97 S.Ct. at 2330.

Although there is general language in the trial judge's charge in this case placing the burden of proof upon the prosecution to establish guilt beyond reasonable doubt, a major portion of the charge consisted of the following:

> While I will instruct you further on this point, I will add at this point, so there is no misunderstanding, that, that as the second element of self defense which I have just discussed, that is in the Defendant's mind there must be a present and impending necessity to shoot the Defendant in order to save himself from death or some great bodily harm. This extends also to protect members of his family toward whom he owes a duty of such protection in a proper case where that is shown.
>
> The right to defend one's self against danger not of his own seeking, which is a right which the law guarantees to all men and the same right which exists to protect himself,

exists also for those depending upon him such as members of his family. In this case the Defendant had the same right to protect his wife or family that he would have had to protect himself in a like situation, though the danger was threatened to his wife, his family or unto himself, if at the time the Defendant shot the deceased, he had reasonable cause to apprehend on the part of the deceased a design to do to himself or to his family great personal injury, and there was reasonable cause for him to apprehend immediate danger of such design being ac-

(Slip Opinion, p.9)

complished and to avert such apprehended danger he shot and at the time he did so he had reasonable cause to believe it necessary for him to shoot in the way he did to protect himself and/or his wife and family from such apprehended danger, then and in that case, the shooting was not felonious but was justifiable and you ought to acquit him on the grounds of necessary self defense.

It is not necessary to this defense that the danger should have been actual or real or that the danger should have been impending and immediately about to follow. All that is necessary is that the Defendant had reasonable cause to believe and did believe these facts, but before you acquit on the ground of self defense you ought to believe that the Defendant because of apprehension for himself and/or his family was reasonable. You are to determine from all of the evidence whether facts constituting such reasonable cause have been established and unless such facts constituting such reasonable cause have been established by the defense in this case you cannot acquit on the ground of self defense, but his actions and conduct are to be judged from the circumstances as they

appeared to him at that time and if from all the evidence in the case there exists in your mind a reasonable doubt whether the respondent did not in fact kill Joseph Matolovich in defense of himself and/or his wife or family, honestly believing his life and/or the life of his wife and family was in jeopardy or that he was in danger of receiving serious bodily injury at the hands of Joseph Matolovich, then it would be your duty to render a verdict of not guilty. It is not necessary to his defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to follow, the actions and conduct of the respondent are to be judged from the circumstances as they appeared to him at the time. One who is suddenly attacked by an adversary is not held to fine distinctions of judgment as to what is in the mind of his adversary or what

(Slip Opinion, p.10)

is his adversary is about to do or to how much force it is necessary for him to use to protect his life or his person from serious harm.

In justification of the offense here charged against him, the respondent has interposed a plea of self defense and under certain circumstances this is a good defense. To make the plea available it must appear that the respondent was without fault on his part, if he himself was the aggressor in the conflict he cannot invoke the doctrine of self defense as an excuse for the killing unless he was at that time in immediate danger of loss of his own life or suffering some grievous bodily injury and there was no retreat open to him and his only safety lay in striking the blow which caused the death of the deceased.

Perhaps even more important is the fact that when the jury in the course of its deliberations sent a note to the judge

requesting instructions upon "three elements necessary to be present for a self-defense decision," the record discloses that the trial judge failed to indicate that the burden of proof on the self-defense issue was on the prosecution and repeated a previously erroneous instruction on the duty to retreat:

> THE COURT: Thank you. The record may so indicate. Ladies and gentlemen, I have a note that you handed to the bailiff for my attention which reads as follows: Three elements necessary to be present for a self defense decision. I will reinstruct you on this point since you will have to depend on this verbal instruction, I will ask you to listen carefully.
>
> Self defense is, in a proper case, a good defense and the right of every person, but it will not justify the taking of human life unless the jurors are satisfied from the testimony of all three of the following things. First, that the Defendant was without fault, second, that there existed in the Defendant's mind at the time he fired the

(Slip Opinion, p.11)

> weapon a present and impending necessity to shoot the decedent in order to save himself or a member of his family from death or some great bodily harm; and, third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus have avoided the conflict. I will read that again for you.
>
> Self defense is, in a proper case, a good defense and the right of every person, but it will not justify the taking of human life unless the jurors are satisfied from the testimony of all three of the following things. First, that the Defendant was without fault; secondly, that there existed in the Defendant's mind at the time he fired the weapon, a present and impending necessity to shoot the decedent in order to save himself or a member of his family from death or some great bodily harm; and third, that there must have been no way open whereby he could have retreated as it appeared to him at the time, to a place of safety and thus avoided the conflict.
>
> I trust this will be of assistance to you. The jury is excused in company with the bailiff. You may retire to the jury deliberation room.
>
> (Jury left the Courtroom at 5:13).
>
> THE COURT: I will ask Counsel if they are satisfied with the additional instructions which the Court has just given the jury.

Neither counsel entered any objection tion, to the charge.

We recognize that appellee Berrier emphasizes that Michigan law does not impose a duty to retreat upon one who is threatened in his own home. *People* v. *Lenkevitch*, 394 Mich. 110 (1975); *People* v. *Stallworth*, 364 Mich. 528, 535, 111 N.W. 2d 742, 746 (1961); *People* v. *Johnson*, 75 Mich. App. 337, 254 N.W.2d 657 (1977). It, however, is by no means clear that this aspect of the trial judge's failure to give a proper

(Slip Opinion, p.12)

instruction would be held to be a federal due process violation in a habeas corpus case. *See Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). As a consequence, we place no reliance upon this clear error in application of Michigan law in our affirmance of the issuance of the writ of habeas corpus.

Under Michigan law proof of the absence of grounds for self-defense is an element of the crime of murder upon which the prosecution must bear the burden of proof.[1] This has been true for many years. One of the clearest statements is found in the leading Michigan case of *People* v. *Coughlin*, 65 Mich. 704, 32 N.W. 905 (1887), where the Supreme Court of Michigan said:

> CHAMPLIN, J. Respondent was convicted of manslaughter, and sentenced to be confined in the State prison at Jackson at hard labor for the period of 13 years. The circuit judge charged the jury that, in cases where the respondent seeks to justify his acts of killing as done in self-defense, the burden of proof is upon himself to establish the killing to have been done in self-defense. This was error. In civil cases the burden of proof is generally upon the party who affirms the existence of facts necessary to make out his case. In criminal cases, however, the burden of proof is upon the prosecutor to show that the accused is guilty of the offense charged. The charge made against respondent in this case *could not be made out* unless the testimony should exclude the idea of self-defense beyond a reasonable doubt. Consequently it was incumbent upon the people to show such facts and circumstances as convinced the jury that the killing was not done in self-defense.
>
> *People v. Couglin, supra* at 705 (emphasis added).

It is perfectly clear, of course, that appellee Berrier in his state court trial did seek "to justify his acts of killing

(Slip Opinion, p.13)

as done in self-defense," and hence, the burden of proof was upon the prosecution to show that "the killing was not done in

[1]
In Michigan murder is defined by common law rather than by statute.

self-defense." The Michigan Supreme Court has adhered to this principle without deviation through a long line of cases: *People* v. *Cathey*, 220 Mich. 628, 631-32, 190 N.W. 753 (1922); *People* v. *Asbury*, 257 Mich. 297, 298-99, 241 N.W. 144 (1932); *People* v. *Stallworth*, 364 Mich. 528, 535, 111 N.W.2d 742 (1961); *People* v. *Jackson*, 390 Mich. 621, 626, 212 N.W.2d 918 (1973).

We entertain no doubt that as a matter of federal due process the prosecution must prove beyond reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Patterson* v. *New York*, 432 U.S. 197, 206 (1977). In Michigan an element of proof of murder is evidence which negates self-defense, in any case where self-defense is claimed and evidence is offered thereon. *See* citations in paragraph above. In this posture of the case, we believe that the District Court and this court are controlled by the Fourteenth Amendment as it has been interpreted by the Supreme Court of the United States in *In re Winship, supra, Patterson, supra,* and *Mullaney* v. *Wilbur, supra.*

In this last case, Mr. Justice Powell, writing for a unanimous Court, held as follows:

> Not only are the interests underlying *Winship* implicated to a greater degree in this case, but in one respect the protection afforded those interests is less here. In *Winship* the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction.

(Slip Opinion, p.14)

Such a result directly contravenes the principle articulated in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958):

> "[W]here one party has at stake an interest of transcending value — as a criminal defendant his liberty — th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial . . . ."

See also *In re Winship*, 397 U.S., at 370-372 (Harlan, J., concurring).

Mullaney v. *Wilbur*, *supra* at 700-01.

Nor do we believe that the error in this charge can be ignored because of the failure of counsel to enter objection to it. *See Wainwright* v. *Sykes*, 433 U.S. 72 (1977). While normally under Michigan law the absence of objection may preclude appellate review of a claimed error nonetheless, when any charge omits an essential element of a crime, reversible error may be found. *People* v. *Liggett*, 378 Mich. 706, 148 N.W.2d 784 (1967); *People* v. *Townes*, 391 Mich. 578, 218 N.W.2d 136 (1974); *People* v. *Peoples*, 75 Mich. App. 616, 255 N.W.2d 707 (1977); *People* v. *Dorrikas*, 354 Mich. 303, 316, 92 N.W.2d 305, 307 (1957).

Like the District Judge, we find no bar to habeas relief in this case because appellant's trial counsel made no objection to the state judge's instructions at the time of trial. The magnitude of the error in this trial would make it cognizable in a habeas proceeding as plain error even where no objection had been made before the trial court. *United States* v. *Buffa*, 527 F.2d 1164 (6th Cir. 1975).

We recognize that the test for habeas relief is even more difficult for a petitioner to overcome. Thus, the Supreme Court has said:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral

(Slip Opinion, p.15)

> attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U.S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.*, at 146.
>
> *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). (Footnote omitted.)

Nonetheless, we conclude that the error here went to the central issue of guilt or innocence and infected the fairness of the trial itself.

A federal habeas court has made its own independent determination of this petitioner's federal claim that he is detained pursuant to a final judgment of a state court, in violation of the United States Constitution. The Supreme Court has recently noted that this principle has not been disturbed by recent cases. *See Wainwright* v. *Sykes*, *supra* at 87, 97 S.Ct. at 2506-07.

Finally, we reject the argument of the State Attorney General on behalf of the warden that despite all that has been

said above, the error should be deemed harmless beyond reasonable doubt within the rule of *Chapman* v. *California*, 386 U.S. 18 (1967). Here the jury's inquiry recited by the District Judge clearly shows its preoccupation with the self-defense issue.

The judgment of the District Court is affirmed.

(Slip Opinion p.16)

ENGEL, Circuit Judge, dissenting.

I respectfully dissent.

I fully agree with the majority that the instructions given by the state trial court were confusing and deficient. Were this matter before us on direct review from a trial court within our own system, there is little doubt in my mind that the exercise of the court's supervisory powers to reverse would be justified. We act here, however, within the narrower confines of federal habeas corpus law.

Like federal law,[1] Michigan law requires that, when self-defense is injected into a trial by the introduction or existence of some evidence supporting the claim, the burden is upon the state to prove beyond a reasonable doubt not only each element of the crime charged but also that the defendant did

[1]

E.g., *United States* v. *Jackson*, 569 F.2d 1003 (7th Cir. 1978); *United States* v. *Corrigan*, 548 F. 2d 879 (10th Cir. 1977); *Frank* v. *United States*, 42 F. 2d 623 (9th Cir. 1930); 2 E. Devitt & C. Blackmar, Federal Jury Practice & Instructions § 41.19 (1977).

not act in self-defense.[2] Unlike the majority, I do not conceive that this rule, under Michigan law, makes the absence of a self-defense an element of proof of the crime itself, which the state must invariably prove beyond a reasonable doubt, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), rather than an affirmative defense, which is not subject to such a constitutional imperative. *Patterson* v. *New York*, 432 U.S. 197, 205-11 (1977).[3] *See Leland* v. *Oregon*, 343 U.S. 790 (1952) (in-

[2]

E.g., *People* v. *Asbury*, 257 Mich. 297, 241 N.W. 144 (1932); *People* v. *Coughlin*, 65 Mich. 704, 32 N.W. 905 (1887); *see People* v. *Stallworth*, 364 Mich. 528, 111 N.W. 2d 742 (1961).

The Michigan State Bar Special Committee on Standard Criminal Jury Instructions prepared the following on self-defense:

> The defendant is not required to prove that he acted in self-defense. The prosecution has the burden of proof of guilt beyond a reasonable doubt, and this includes the responsibility of proving that the defendant was not acting in self-defense.

Michigan Criminal Jury Instructions 7:9:06 (1977 ed.).

[3]

Patterson states:

> We thus decline to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

432 U.S. at 210.

(Slip Opinion, p.17)

sanity defense), *discussed with approval, Patterson, supra,* 432 U.S. at 204-07; *Hankerson* v. *North Carolina,* 432 U.S. 233, 245 (1977) (Blackmun, J., concurring) (self-defense).

If self-defense is not in issue in a murder trial, there is no obligation under Michigan law for the trial judge to instruct the jury upon it. *People* v. *Townes,* 391 Mich. 578, 218 N.W. 2d 136, 141 (1974); *People* v. *Dickerson,* 30 Mich. App. 447, 186 N.W. 2d 850, 852 (1971); *People* v. *Johnson,* 13 Mich. App. 69, 163 N.W. 2d 688, 691 (1968), *rev'd on other grounds,* 382 Mich. 632, 172 N.W. 2d 369 (1969), *cert. denied,* 397 U.S. 1079 (1970).[4] The duty to instruct under Michigan practice arises only if the evidence in the particular case suggests its applicability. Even though the state, as a matter of its own law, has elected to negate self-defense beyond a reasonable doubt, the defendant must first introduce or at least point to evidence from which its existence may be inferred.

Where the state has permissibly cast upon the defendant the burden of producing evidence to support the existence of a fact, negation of that fact is not in common understanding an element of the crime. Absence of self-defense is simply not a fact which must be proved for every charge of murder in Michigan, and it is anomalous to label it an element for some

(Slip Opinion, p.18)

murder prosecutions and not for others. The foregoing rea-

[4]

The pattern jury instructions for Michigan, however, recommend a generalized instruction on the absence of justification or excuse which is to be given in every case:

"A killing is not murder if it is justified [or] excused . . . ."

Michigan Criminal Jury Instructions, *supra,* 16:3:01(7).

sons convince me that the absence of self-defense is not an element of the crime for which Berrier stands convicted.

Patterson indicates, without elaboration, that there are substantive constitutional restraints on a state's power to define the elements of crime. 432 U.S. at 210. I am not convinced, however, that due process requires Michigan to make the absence of self-defense an element of homicide, rather than an affirmative defense, and I do not understand the majority to so hold. That being the case, Michigan may elect to allocate the burden to prove the mitigating fact of self-defense however it chooses, just as in *Patterson* the state permissibly burdened the defendant with the obligation to prove the mitigating fact of extreme emotional disturbance. *See* Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 Mich. L. Rev. 30, 42-46 (1977).

While it is unnecessary to suggest, as Professor Allen convincingly does,[5] that *Patterson* v. *New York* overruled *Mullaney* v. *Wilbur,* it seems reasonably clear that *Patterson* would permit a state to treat self-defense as an outright affirmative defense and to allocate the burden of persuasion to the defendant as the instructions, according to the majority, did at Berrier's trial. If the foregoing view is correct, then the state trial judge's instructions, though perhaps erroneous under state law,[6] do not violate constitutional rights under *Mullaney* v. *Wilbur,* as later refined in *Patterson,* where the ordinary and traditional elements of second-degree murder were proved beyond a reasonable doubt.

[5]

Allen, *supra,* 76 Mich. L. Rev. at 53-55.

[6]

The law of the case, as far as Michigan law is concerned, is that the instructions given by the state trial court are correct, regardless of any contrary view we may have regarding state law.

Even if the instructions were found violative of *Mullaney* v. *Wilbur*, I am of the opinion that the failure of counsel to object at trial to the instructions as given precludes our

(Slip Opinion, p.18)

reaching the issue here by application of the more narrow review of state error propounded in *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). *See also Henderson* v. *Kibbe*, 431 U.S. 145, 157 (1977) (Burger, C.J., concurring). Those decisions rejected the "deliberate bypass" language of *Fay* v. *Noia*, 372 U.S. 391 (1963), in favor of a rule precluding federal habeas review in states having a contemporaneous objection rule where it is shown that defense counsel failed to object timely to the error.[7] A federal court may overlook the state procedural waiver only if the habeas petitioner bears his burden of showing both "cause" justifying his failure to object and "prejudice" actually resulting to the petitioner from the con-

[7]

Wainwright v. *Sykes* indicates that a federal court, as a matter of comity, must give effect to a state's contemporaneous objection rule. The Court recognized that the state procedural requirement serves several legitimate purposes which would be undermined if a federal habeas forum were permitted to overlook the default. 433 U.S. at 88-90. Acknowledging that a contemporaneous objection rule would be an adequate and independent state procedural ground which would bar direct review, *id.* at 86-87, the Court held that a procedural default must also be honored in a collateral attack upon a state conviction.

[8]

Michigan's court rules expressly provide that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection." GCR 516.2, made applicable to criminal trials by GCR 11 and 785. *See also People* v. *Rand*, 397 Mich. 638, 247 N.W. 2d 508, 511 (1976); *People* v. *Hall*, 396 Mich. 650, 242 N.W. 2d 377 (1976); *People* v. *Alcala*, 396 Mich. 99, 237 N.W. 2d 475 (1976).

stitutional error. Michigan had and has a contemporaneous objection rule.[8]

While *Wainwright*, on its facts, was concerned with the failure of counsel in the state trial to object to the admission of a confession later claimed to violate the defendant's rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Hankerson* v. *North Carolina*, *supra*, decided contemporaneously with *Wainwright* and involving the retroactive application of *Mullaney*, furnishes considerable authority that *Wainwright* was intended to be fully applicable to waivers resulting from the failure

(Slip Opinion, p.20)

to object to jury instructions. In *Hankerson*, as here, it was claimed that the state trial judge's instructions to the jury in the petitioner's state murder trial impermissibly shifted to the defendant the burden of proving the defense of self-defense, contrary to the holding of *Mullaney* v. *Wilbur*, *supra*. While holding that *Mullaney* was to be retroactively applied, Justice White in *Hankerson* expressly met the state's argument that retroactive application would be "devastating" by observing that the states could "insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson*, *supra*, 432 U.S. at 244 n.8.

Petitioner has not met his burden under *Wainwright* of showing any cause justifying the failure of counsel to object at trial and, indeed, none can be gleaned from the record.[9] This should end the matter in my opinion, for the test in

[9]

As in *Wainwright* v. *Sykes*, *supra*, Berrier has furnished no explanation whatever for the failure to object at trial, even though an opportunity to do so was clearly afforded his counsel at the trial. I find the absence of cause under *Wainwright* to be particularly evident here, where any right to object was based upon a long-standing principle of law. *See* note 2, *supra*.

Wainwright is two-pronged and in the conjunctive.[10]

Wainwright necessarily assumes not only error but constitutional error of sufficient proportions to be cognizable in habeas proceedings; were it otherwise the Supreme Court would not have needed to determine the effect of procedural waivers occurring in the course of trial. *Wainwright* indicates that, notwithstanding substantial constitutional error, the writ may only issue upon the further showing of cause and prejudice. Assuming, however, that the language of Justice Rehnquist in *Wainright* alluded to in the majority opinion, *ante* at 15, permits an examination into the question of prejudice, even where no cause is shown, I am convinced that the error

(Slip Opinion, p.20)

here does not rise to that degree of substantiality which *Wainwright*, according to the majority, arguably suggests. My reasons are six-fold:

First, the instructions are actually contradictory as to which party bore the burden of persuasion on self-defense. In two portions of the charge, including one immediately following the lengthy quotation from the instructions in the majority opinion, *ante* at 8-10, the trial court squarely placed the burden of persuasion as to self-defense on the state.[11] It is well established that "a single instruction to a jury may not be

[10]

433 U.S. at 84-85, 87. *But cf. The Supreme Court, 1976 Term,* 91 Harv. L. Rev. 70, 218 (1977):

> The Court has never made clear . . . whether [the elements of cause and prejudice] are in fact independent of each other.

judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U.S. 141, 146-47 (1973).

Second, the instructions themselves, though poor, did at least include the traditional charges on the presumption of innocence and reasonable doubt. In addition, the charge placed a particularly heavy burden of proof on the government in at least one respect.[12]

[11]

> Self defense in proper cases is the right of every person but it will not justify the taking of a human life unless the jurors shall be satisfied from the testimony first that the Defendant was not the aggressor in bringing on the difficulty, that is, that he was without fault; second, that there existed at the time of the striking of the fatal blow in his mind a present and impending necessity to strike such a blow in order to save himself from death or some great bodily harm; third, that there must have been no way open whereby he could have retreated as it appeared to him at the time to a place of safety and thus have avoided the conflict. Unless you find that all three of these facts are established in this case then the plea of self defense fails. *The burden of proof of all such matters is upon the People to show that the respondent is guilty of the offense charged and the People's testimony must be such as to satisfy the jurors that the killing was not done in self defense. The burden is not on the Defendant who makes the claim of self defense to satify the jury of the truth of his claim.* (Emphasis added).

Tr. at 560-561. Similar language also appeared earlier in the charge.

[12]

The trial court instructed:

> To find the defendant guilty you must be able to say that there is no rational theory on which credible evidence can be reconciled, but that of the defendant's guilt.

Tr. at 562. An instruction of this nature need not be given in a federal trial. *Holland* v. *United States,* 348 U.S. 121, 139-40 (1954) (rejecting an instruction to the effect that the evidence must exclude every reasonable hypothesis other than that of guilt).

(Slip Opinion, p.22)

Third, the defendant's attorney was present and heard the entire instructions as actually delivered by the trial judge to the jury. That he thereafter expressed his satisfaction with them is affirmative evidence that the instructions were not considered prejudicial under Michigan law by a Michigan attorney, whose primary function was to protect his client from such prejudice.[13]

Fourth, the issue was essentially which of two irreconcilable versions of the incident the jury would believe. The government claimed that Berrier was angry with the decedent, his brother-in-law, for having testified against him in an earlier criminal trial and introduced evidence that Berrier had earlier expressed the intention to kill him. It was the government's contention that Berrier shot his brother-in-law seven times as the latter was leaving the Berrier home on the night in question. On the other hand, the defendant's theory and testimony was that he heard a commotion at the door, heard his wife scream, feared for his own life and that of his family, and that he thereupon seized his gun and fired at the man in self-defense, not knowing who it was. In such circumstances subtle differences in the application of the law of self-defense, and even in the burden of proving it, are unlikely to have

[13]

To the extent that the attorney's conduct may have failed to protect the petitioner, the issue of his competence under the Sixth Amendment is not before our court in this appeal. *See generally The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 217-18 (1978).

played an important role in the jury's deliberations.[14] Put simply, the critical issue was whether Berrier did or did not recognize his brother-in-law.

Fifth, the alleged constitutional error here pales in comparison with the potential prejudice to a defendant from the

(Slip Opinion, p.23)

improper admission of his confession to the crime, an error which, in *Wainwright*, did not override the petitioner's duty to show cause and prejudice to avoid a procedural waiver of error.

Finally, Justice White in *Hankerson* persuasively indicates that a state like Michigan, whose rules provide a waiver of error for the failure to object to jury instructions, may effectively insulate past convictions from the retroactive application of *Mullaney*.

Accordingly, I would reverse and remand with instructions to dismiss the petition unless further proceedings in the district court should reveal merit in the other issues raised therein but not resolved in the district court or here.

[14]

See United States v. *Jackson*, 569 F.2d 1003, 1010 (7th Cir. 1978). In a similar setting, the district court's failure to instruct that the government must prove beyond a reasonable doubt that the defendant did not act in self-defense was held not to be plain error, cognizable without an objection at trial.